92-1383

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DONALD F. BOGUE,

Petitioner,

v.

AMPEX CORPORATION AND ALLIED-SIGNAL, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two questions are presented. The second question need only be addressed if the first question is answered in the affirmative.

Question 1: Does ERISA (Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq.) preempt state law where a parent corporation establishes a program to pay special incentive compensation to a small number of senior executives employed by its subsidiary corporation for the purpose of inducing the executives to assist the parent in a sale of the subsidiary?

Question 2: If the answer to question 1 is affirmative, should the district court review de novo the parent corporation's denial of an executive's claim for a severance payment under the special compensation program where the program documents do not state that the parent could exercise discretion in determining the executive's claim or in construing the terms of the program?

PARTIES TO THE PROCEEDINGS

The petitioner is DONALD F. BOGUE, plaintiff/appellant in the courts below. The respondents are ALLIED-SIGNAL, INC. ("Allied-Signal"), a publicly-owned corporation, and AMPEX CORPORATION ("Ampex"). Ampex was wholly-owned by Allied-Signal until May 1987 when it was purchased by the Newhill Acquisition Corporation. Ampex is now owned by N.H. Holding, Incorporated.

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PETITION FOR WRIT OF CERTIORARI

DONALD F. BOGUE ("Bogue"), petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The United States District Court for the Northern District of California granted Respondents' Motion for Summary Judgment on all of Petitioner's claims in district court. *Bogue v. Ampex Corp.*, 750 F.Supp. 424 (N.D. Cal. 1990) (App., *infra*, 16a-31a). This district court opinion was affirmed on appeal by the United States Court of Appeals for the Ninth Circuit. *Bogue v. Ampex Corp.*, 976 F.2d 1319 (9th Cir. 1992) (App., *infra*, 1a-15a).

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed October 7, 1992 and amended December 2, 1992. Petitioner's Petition for Rehearing in the Court of Appeals for the Ninth Circuit was denied on November 23, 1992. (App., *infra*, 34a.) A Petition for Writ of Certiorari is due February 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in general are set forth in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"). Specifically, 29 U.S.C. § 1144(a) provides in pertinent part:

> [t]his chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title . . .

29 U.S.C. § 1003(a) provides in pertinent part:

> [t]his subchapter shall apply to any employee benefit plan if it is established or maintained (1) by any employer engaged in commerce . . .

29 U.S.C. § 1002(5) defines the term "employer" as follows:

> [t]he term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(3) defines "employee benefit plan" as follows:

> [t]he term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

The term "employee welfare benefit plan" is defined at 29 U.S.C. § 1002(1). Because of its length, its pertinent text is set forth in Appendix F pursuant to rule 14.1(f) of the rules of this Court. (App., *infra*, 41a-44a.)

29 U.S.C. § 1002(2)(A) defines "employee pension benefit plan" in pertinent part as follows:

> [a]ny plan, fund, or program which was or is hereafter established or maintained by an employer, or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . .

STATEMENT OF THE CASE

A. Statement of Facts.

Bogue was employed by Ampex from September 1976 until February 1988. During 1986 and 1987, Ampex was a wholly-owned subsidiary of Allied-Signal. Allied-Signal was a large United States corporation which owned many subsidiary corporations, including Ampex.

In 1986 Allied-Signal decided to sell several subsidiaries, including Ampex. In order to induce the key executives of Ampex to help it in selling Ampex, Allied-Signal established what it called the "Allied-Signal/E&I Sector Special Compensation Program for Designated Key Executives" (the "Allied-Signal Special Compensation Program" or the "Program").[1] In November 1986, the Allied-

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[1] The Program was documented by a letter from Allied-Signal to Bogue describing the circumstances under which the compensation would be paid. The full text of the Program is set forth in Appendix E. (App., *infra*, 35a-40a.)

Signal Special Compensation Program was offered to 10 key senior Ampex executives, including Bogue.

The Program had three components: (1) a stay bonus, (2) a sale price incentive, and (3) severance pay. The stay bonus provided for additional bonus compensation to the executives if they stayed in the employ of Ampex during and after the time Ampex was being offered for sale by Allied-Signal. The sale price incentive component provided for a bonus payment to the executive if Allied-Signal was successful in obtaining a sale price for Ampex in excess of $375 million. The amount of the bonus increased by $2,000 for each $1 million in sale price over the $375 million. Finally, the severance pay component of the Program provided for severance pay to the executive if, after the sale of Ampex, the new owners either terminated the executive's employment prior to March 31, 1988, *or* failed to offer the executive employment which was "substantially equivalent" to the employment held by the executive when Ampex was owned by Allied-Signal.

During May 1987, Allied-Signal sold Ampex to the Newhill Acquisition Corporation for substantially more than $375 million. Bogue remained employed by Ampex during the sale process and Allied-Signal paid him his stay bonus compensation. Because the sale price exceeded the $375 million threshold level set by Allied-Signal, Bogue received his sales price compensation under the sale price incentive component of the Program.

After the new owners took control of Ampex, they instituted a major corporate reorganization which changed the nature of Bogue's position from the vice president and general manager of its Audio-Video Systems Division to a newly-created position in charge of a sales and marketing group. Bogue informed the new owners that this employment was not "substantially equivalent" to the employment he held when Ampex was owned by Allied-Signal. Bogue then requested his severance compensation from Allied-Signal under the Program. Allied-

Signal denied Bogue's claim for the severance compensation contending that the new owners of Ampex had, in fact, offered him "substantially equivalent employment."

The term "substantially equivalent employment" is defined in the Program as a job having all of the following: (1) a 90 percent equivalent salary, (2) a location not more than 50 miles from Redwood City, California, and (3) "responsibilities similar" to the responsibilities held by the executive when Ampex was owned by Allied-Signal (App., *infra*, 39a-40a). Bogue claimed that the new job did not have "responsibilities similar" to the job he held when Ampex was owned by Allied-Signal and the new owners had, therefore, failed to offer him "substantially equivalent" employment. Allied-Signal disagreed and this litigation followed.

B. Proceedings in the Courts Below.

Bogue initially filed suit in the California Superior Court, San Mateo County, alleging claims for breach of contract. Respondents removed the action to the Federal District Court for the Northern District of California on the basis of ERISA preemption (29 U.S.C. 1144(a)). Respondents then moved for summary judgment based on ERISA preemption and Bogue moved for a remand to state court. The district court ruled, in an unpublished decision, that ERISA applied to the Allied-Signal Special Compensation Program and Bogue's state court remedies were preempted.[2] The court dismissed Bogue's complaint with leave to amend to state claims under ERISA.

After Bogue amended his complaint to seek relief under ERISA, the district court granted respondents' second motion for summary judgment, holding that Allied-Signal had not abused its discretion in denying Bogue's claim (*Bogue v. Ampex Corp.*, 750 F.Supp. 424 (N.D.

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[2] The order of the district court is set forth in full at Appendix C. (App., *infra*, 32a-33a.)

Cal. 1990). The district court denied Bogue's request for a trial de novo, holding that Allied-Signal had discretionary authority to decide Bogue's claim under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). The full text of the district court's opinion is set forth at Appendix B. (App., *infra*, 16a-31a.)

Bogue appealed this decision to the United States Court of Appeals for the Ninth Circuit on various grounds including, inter alia: (1) that the Allied-Signal Special Compensation Program is not an ERISA employee benefit plan and, therefore, his state-law based claims should not have been preempted, and (2) if the Program is an ERISA employee benefit plan, the standard of review in the district court should have been de novo and not abuse of discretion. The Ninth Circuit affirmed, holding that the Program is an ERISA employee benefit plan within the meaning of 29 U.S.C. § 1144(a); therefore, Bogue's state-law claims and remedies were preempted. The court also affirmed the district court's holding that Bogue was not entitled to de novo review because Allied-Signal had discretionary authority to decide Bogue's claim. (*Bogue v. Ampex Corp.*, 976 F.2d 1319 (9th Cir. 1992).) The full text of the court of appeals' opinion is set forth at Appendix A. (App., *infra*, 1a-15a.)

C. Basis for Jurisdiction in the Court of First Instance.

Federal court jurisdiction in the first instance is disputed. Bogue contends that there is no basis for federal jurisdiction in the first instance. Bogue filed his complaint in state court and it was removed to federal district court by respondents under the claim of ERISA preemption. The district court and the court of appeals agreed with respondents and found federal question jurisdiction under ERISA. Under Question No. 1, Bogue requests that this court review the judgment below that ERISA provided federal jurisdiction to remove his action from state court. There is no other basis for federal court jurisdiction.

REASONS FOR GRANTING THIS PETITION

I. INTRODUCTION.

This petition presents two major issues. The first issue involves the question of ERISA preemption in a special executive compensation program. Consideration of this issue requires that a distinction be made between a "compensation plan" which is not governed by ERISA, and an "employee benefit plan" which is governed by ERISA. It also requires consideration of how much of an administrative scheme is required to make a plan or program subject to the preemption rule of *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). By holding that the Program is subject to ERISA, the Ninth Circuit has split with the Fifth Circuit. (See, *infra*, pp. 8-13.)

If this Court determines that the Program is an "employee benefit plan" under ERISA, then the Court should also determine the appropriate standard of review of Bogue's claim in the district court. The rule on standard of review was announced by this Court in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Since *Firestone*, there has been a significant conflict in the circuit courts in interpreting this Court's rule of "discretionary authority" as an exception to de novo review. (See, *infra*, pp. 14-20.)

II. THE PREEMPTION ISSUE.

Question No. 1 presents the important issue of whether Congress intended ERISA to apply to incentive compensation programs related to corporate acquisitions and mergers. Specifically, should ERISA preempt state law in a situation where the owner of a corporate enterprise designs an incentive compensation program for a few key executives of its subsidiary for the purpose of providing the executives with a financial incentive to assist the owner in its sale of the subsidiary?

The acquisition and merger of large corporations is commonplace in corporate America. Executive incentive compensation programs designed to aid the purchase and sale process are typically found in such transactions. Whether the detailed federal scheme of ERISA should apply to these programs is of major importance to the employers and employees of this country. There are conflicting opinions in the circuit courts on this issue. This Court should use this case as an opportunity to resolve the conflict and establish a rule for ERISA preemption that draws the line between ERISA employee benefit plans and non-ERISA incentive compensation programs.

A. The Requirement of an Administrative Scheme.

The threshold question on the preemption issue is whether the Allied-Signal Special Compensation Program is an ERISA employee benefit "plan" within the meaning of 29 U.S.C. § 1144(a). ERISA does not define the term "plan" and the circuit courts have found its definition to be "elusive at best." *Williams v. Wright*, 927 F.2d 1540, 1543 (11th Cir. 1991).

The Ninth Circuit in *Bogue* resolved the ERISA "plan" issue by an analysis of the administrative scheme required by the severance pay component of the Program. The Court held that the decision-making requirements of the Program established a sufficient administrative scheme to satisfy the rule established by this Court in *Fort Halifax*. In *Fort Halifax*, this Court held that there is no preemption if there is "no need for an ongoing administrative program for processing claims and paying benefits." *Id.*, at 12.

By holding that the Program had a sufficient administrative scheme to make it an ERISA "plan," the Ninth Circuit has split with the Fifth Circuit on this issue. The Fifth Circuit found no administraitve scheme and no ERISA "plan" within the meaning of *Fort Halifax* under a General Motors Voluntary Termination of Employment

Plan where General Motors made lump sum or two-year installment payments to employees who elected to cease working for G.M. *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990). The court reasoned that payment of severance benefits to large numbers of employees over a two-year period did not require the type of administrative scheme described in *Fort Halifax*.

The Fifth Circuit also held that a "golden parachute" severance pay plan triggered by a corporate takeover was not an ERISA "plan" because it had payment provisions similar to those found in *Wells* and did not require an administrative scheme. *Fontenot v. NL Indus., Inc.*, 953 F.2d 960 (5th Cir. 1992).[3]

In conflict with the Fifth Circuit is the Third Circuit in *Pane v. RCA Corp.*, 868 F.2d 631 (3rd Cir. 1989). *Pane* held that a similar executive severance program designed to retain key executives during merger negotiations was an ERISA plan. Without explanation, the court simply stated that an administrative scheme was required. *Id.*, at 635. In distinguishing *Pane*, the Fifth Circuit in *Fontenot* stated: "[s]urely, *Pane* does not stand for the proposition that every 'golden parachute' is an ERISA plan." *Fontenot* at 962-63.

Recognizing the conflict between the Fifth Circuit in *Wells* and the Third Circuit in *Pane*, the Ninth Circuit in *Bogue* followed the Third Circuit in holding that the Program was an ERISA "plan." *Bogue*, at 1323. Because Allied-Signal would be required to use its judgment

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[3] The severance plan in *Fontenot* was similar to the Allied-Signal Special Compensation Program except that it was triggered by a hostile takeover. These programs are typically referred to as "golden parachutes." (In *Fontenot*, the plan was called the "Senior Executive Severance Plan.") The Allied-Signal Special Compensation Program was a "golden handcuffs" program, not a "golden parachute," because payments were triggered by a negotiated, non-hostile sale of Ampex.

in determining Bogue's claim, the Ninth Circuit reasoned that this amounted to discretionary authority and an administrative scheme that took the Program outside the ambit of *Fort Halifax* and *Wells*. *Bogue*, at 1323.

This Court should use this case as an opportunity to resolve the conflict and state a rule of law which defines the scope of an administrative scheme necessary for ERISA preemption under *Fort Halifax*.

B. The Issue of Employer Purpose in Establishing the Plan.

This petition also presents the question of where to draw the line between an executive compensation program and an ERISA employee benefit plan. The Allied-Signal Special Compensation Program has features which bring the issue into sharp focus and this Court should use this case to establish a rule of law distinguishing the two forms of employee benefits. This Court has not yet ruled on this issue, and the Ninth Circuit has now split with the Fourth, Fifth and Eleventh Circuits by holding that the Allied-Signal Program is an ERISA employee benefit plan.

The leading case on this issue is *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 575-76 (5th Cir. 1980). The *Murphy* court looked to the purpose of the employer in creating a plan for discretionary incentive bonus payments which were likely to extend beyond the term of employment or death of the employee. The court held that where the employer (Inexco) intended the plan to reward its employees for current services, it is not an ERISA plan even if the employees or their heirs are likely to continue collecting payments after retirement or death. The *Murphy* court analyzed the plan in question under both the test of an "employee welfare benefit plan" (29 U.S.C. § 1002 (1)) and the test of an "employee pension benefit plan" (29 U.S.C. § 1002(2)) and held that the Inexco plan was neither. *Id.*, at 574-576. The court held that the crucial factor is the *purpose* of the employer in establishing the

plan. If the primary purpose is to provide post-employment benefits, it is an ERISA plan. If the primary purpose is to provide an incentive for current services, it is not an ERISA plan, even if it incidentally provides for post-employment benefits. *Id.*, at 574-576.

The Eleventh Circuit has followed the Fifth Circuit by holding that a compensation plan is an ERISA plan if it was designed for the primary purpose of providing retirement income. If post-retirement income is only incidental to an employment contract, it is not an ERISA "plan." *Williams v. Wright*, 927 F.2d 1540, 1547 (11th Cir. 1991).

Similarly, *Fraver v. North Carolina Farm Bureau Mut. Ins. Co.*, 801 F.2d 675 (4th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987), involved payment of insurance commissions in monthly installments for five years after employment termination. The Fourth Circuit held that this was not an ERISA plan because the plan was in the nature of an employment or agency contract that provided for a final commission payable over a number of years after the employment terminated. *Id.*, at 678. The fact that payments were made after termination of the relationship did not create an ERISA "plan."

In *Bogue*, the Ninth Circuit held that an ERISA plan existed without analyzing the purpose of Allied-Signal in establishing the Program. Instead, the Ninth Circuit considered only the severance pay component of the Program because it was the only component that was not paid to Bogue. *Bogue*, at fn. 3. However, the Program as a whole shows that the clear purpose of Allied-Signal in establishing the Program was to create a financial incentive to the Ampex executives to provide current services for the benefit of Allied-Signal in its proposed sale of Ampex.[4]

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[4] Petitioner raised this issue in the Ninth Circuit by arguing that the Program was not established or maintained by Bogue's

A clear conflict now exists between the Ninth Circuit on the one hand in *Bogue*, and the Fourth, Fifth and Eleventh Circuits in *Fraver*, *Murphy* and *Williams* over the proper test for determining whether a special compensation program is an ERISA "plan." This Court has not yet addressed the issue and this petition would afford an opportunity to resolve the conflict and establish the correct rule of law.

This case also presents the important ERISA definitional issue of what constitutes an "employer" under the statute. ERISA plans must be established or maintained by an "employer" or any person acting indirectly "in the interest of an employer" as required by 29 U.S.C. §§ 1003 (a) and 1002(5). Allied-Signal was not Bogue's employer. Moreover, Allied-Signal was clearly acting only in its own self-interest, i.e., to maximize the sale price of Ampex. Although the Ninth Circuit recognized the self-interest of Allied-Signal, it held that it could not be said that the Program was *not* in the interest of Bogue's employer (Ampex). *Bogue*, at fn. 18. However, whether the Program was not in the interest of Ampex is not the issue. ERISA requires an affirmative finding that a plan was established or maintained either: (1) by an employer, or (2) in the interest of an employer. 29 U.S.C. § 1002(5). The Ninth Circuit made no holding that the Program was "in the interest" of the employer. It only held there was no showing that it was *not* in the interest of the employer (*Bogue*, at fn. 18) and that the new owners of Ampex agreed to pay any amounts Allied-Signal determined to be due. *Bogue*, at 1324. The plain purpose of the Pro-

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employer (Ampex) or anyone acting on behalf of Bogue's employer, as required by 29 U.S.C. §§ 1003(a) and 1002(5). The Ninth Circuit dismissed this claim by holding that the Program was established or maintained by the employer because the new owners of Ampex later agreed to fund any payments Allied-Signed found to be due under the Program. Petitioner submits that Ampex's later agreement to fund the Program is irrelevant to the question of who "established or maintained" the Program.

gram was to benefit Allied-Signal and the ten Ampex executives chosen by Allied-Signal to participate in the Program. Ampex, the only employer of Bogue, neither established nor maintained the Program as required for an ERISA employee benefit plan. (29 U.S.C. §§ 1003(a) and 1002(5).)

For the reasons stated above, this Court should grant this petition and provide needed guidance on the proper test for distinguishing between an employee benefit plan that is governed by ERISA and an incentive compensation program that is not.

III. THE PROPER STANDARD OF REVIEW IF ERISA GOVERNS.

If this Court determines that the Allied-Signal Special Compensation Program is an ERISA employee benefit plan, then it should also address the issue of the proper standard of review by the district court of Allied-Signal's denial of Bogue's claim.

A. The Rule in *Firestone*.

In 1989 this Court established the rule that an ERISA claim under 29 U.S.C. § 1132(a)(1)(B) is to be reviewed de novo by the district court "[u]nless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone*, at 115. Since *Firestone*, the circuit courts have issued conflicting opinions on whether the "discretionary authority" must be expressed in the plan documents or can be implied from the plan's facts and circumstances. The Ninth Circuit in *Bogue* is clearly on the "implied" side of the split and has gone further in that direction than any other circuit in finding discretionary authority. The *Bogue* court held that, although the Program makes no mention of discretionary authority to determine eligibility for benefits, discretionary authority existed because the terms of the Program

required Allied-Signal to use a "judgmental function" in deciding whether Bogue was entitled to benefits. *Bogue* at 1325. The Ninth Circuit adopted the district court's ruling and cited no authority from any other circuit for the holding on this point.[5]

Firestone makes clear that discretion is the exception, not the rule. *Anderson v. Great West Life Assur. Co.*, 942 F.2d 392, 395 (6th Cir. 1991). In cases decided after *Firestone*, circuit courts have disagreed over what language is necessary in the ERISA plan to rebut *Firestone's* presumption of de novo review, but no case has gone as far as *Bogue* in denying de novo review where there is no plan language providing a discretionary grant.

B. The Post-*Firestone* Split in the Circuit Courts.

Since *Firestone*, the circuits have divided over whether "generic language" such as the authority to "construe disputed or doubtful terms" confers discretion or merely serves to identify *who* shall decide. See, *Pratt v. Petroleum Production Management, Inc.*, 920 F.2d 651, 658 (10th Cir. 1990) and *Sisters of the Third Order of St. Francis v. SwedishAmerican Group Health Ben. Trust*, 901 F.2d 1369, 1371 (7th Cir. 1990). The First, Second, Fourth, Fifth, Sixth, Seventh and Eighth Circuits require an express grant of discretionary authority, while the Third, Ninth, Tenth, Eleventh and District of Columbia Circuits hold that discretionary authority may be implied. However, no circuit court case—other than *Bogue*—has equated the ERISA administrator's performance of a judgmental function with a grant of discretionary authority.

In *Sisters of the Third Order*, the parties disputed the significance of the SwedishAmerican ERISA plan's lan-

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[5] The court purported to rely on the "virtually indistinguishable" language of the ERISA plan in *Eley v. Boeing Co.*, 945 F.2d 276 (9th Cir. 1991), but that case is clearly distinguishable based on the express grant of "final authority" to Boeing in deciding claims. 945 F.2d at 278, fn. 2. The Program in *Bogue* contains no such language.

guage which included authority "[t]o construe and interpret the Plan, decide all questions of eligibility and determine the amount, manner and time of payment of any benefits hereunder." *Id.*, at 1371. Without deciding the issue, the Seventh Circuit described the split of authority:

> [t]his language might be taken as "power to construe disputed or doubtful terms" within the meaning of *Firestone*. Because trustees may carry out their duty without language of this sort, its presence frequently signals the existence of discretion in implementation. [Citation omitted.] Perhaps, though, it describes *who* shall decide (the Plan Committee, as opposed to other parties involved in the establishment and implementation of this complex welfare benefits plan) rather than the *extent* of the committee's powers. Courts predictably have divided over the characterization of such ambiguous language. Compare *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1186-87 (4th Cir. 1989), *Curtis v. Noel*, 877 F.2d 159, 161 (1st Cir. 1989), and *Lowry v. Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 524-25 (5th Cir. 1989), treating language similar to that in the SwedishAmerican Plan as granting discretion sufficient to require deferential review, with *Baxter v. Lynn*, 886 F.2d 182, 187-88 (8th Cir. 1989), and *International Brotherhood of Electrical Workers, Local 47 v. Southern California Edison Co.*, 880 F.2d 104, 108 (9th Cir. 1989), going the other way.

Id., at 1371, emphasis in original.

In later cases, the Seventh Circuit has sided with those courts holding that power to make "final and binding" decisions does not imply discretion to construe terms. *Ziaee v. Vest*, 916 F.2d 1204, 1207 (7th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1581 (1991); *Petrilli v. Drechsel*, 910 F.2d 1441 (7th Cir. 1990). In *Petrilli*, the claims involved plan interpretations of whether there was a voluntary departure or "layoff" and the plan did not give express discretionary authority over such inter-

pretations. *Id.*, at 1447. The Seventh Circuit remanded the case for reconsideration because the district court failed to apply a de novo standard in reviewing the denial of claims for severance benefits. The *Bogue* decision directly conflicts with *Petrilli* because the administrator's determination of what constituted a "layoff" also required the exercise of a "judgmental function."

The Sixth Circuit has also required express language granting discretion. In *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 550 (6th Cir. 1989), the Sixth Circuit held that an eligibility provision requiring the employer to distinguish between "layoffs" and "terminations" did not impliedly confer discretion; "[a]bsent a clear grant of discretion to the administrator, application of the highly-deferential [standard] does not promote [ERISA's] goals." Similarly, the Sixth Circuit in *Johnson v. Eaton Corp.*, 970 F.2d 1569, 1571 (6th Cir. 1992) held "[t]his circuit has interpreted *Firestone* to require that the plan 'expressly' give discretionary authority to the administrator." These decisions are in clear conflict with *Bogue* which required no such express grant.

In *Pratt*, the Tenth Circuit also identified the conflict:

> [h]ere, an administrative committee is given power to construe and interpret the plan and that committee may seek guidance from others. *See supra* n.7. Courts have divided concerning whether similar generic language empowers a fiduciary with discretion "to construe disputed or dobutful terms," *see Bruch*, 489 U.S. at 111, 109 S.Ct. at 954, or merely serves to identify a particular fiduciary responsible for general plan interpretation. [Citations indicating split in circuits omitted.]

Pratt, at 920 F.2d 651, 658.

The administrator in *Pratt* was specifically given powers to construe and interpret, decide eligibility and "determine the right of any person to a benefit, in accord-

ance with the Plan . . ." *Id.*, at 657. The court held that this language vested the administrator with "not only the authority, but also the discretion, to decide questions of plan interpretation." *Id.*, at 658.

Contrary to *Pratt*, the Eighth and Fourth Circuits side with de novo review given this "generic language." *Baxter v. Lynn*, 886 F.2d 182, 187-88 (8th Cir. 1989); *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1079 (4th Cir. 1989), *cert. denied*, 493 U.S. 919 (1989). In *Baxter*, the plan language provided "that the trustees have the final authority to determine all matters of eligibility for the payment of claims." The court held this clause "[m]erely describes the trustees' mandatory role in accepting or rejecting claims submitted to the Fund. It does not grant to the trustees the authority to construe ambiguous terms." *Id.*, at 188. *Dzinglski* held that a grant of final authority to determine eligibility standards under a disability benefits plan did not constitute discretionary authority to allow or deny benefits, but merely described the mandatory role to accept or reject claims. *Dzinglski*, at 1079.

Also requiring express language is the Fifth Circuit in *Cathey v. Dow Chemical Co. Medical Care Program*, 907 F.2d 554, 559 (5th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 964 (1991), and *Schultz v. Metropolitan Life Ins. Co.*, 872 F.2d 676, 678 (5th Cir. 1989). In *Schultz*, the court held de novo review applied because "[n]either party has pointed to any provision in the plan which gives the administrator discretionary authority to determine benefit eligibility or to construe the plan terms." *Id.*, at 678. In *Cathey*, the court held that absent an *express* grant of discretion over entitlement determinations, the deferential review operates adversely to "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Id.*, at 559; *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 636 (5th Cir. 1992) ("[d]iscretionary authority cannot

be implied; an administrator has no discretion to determine eligibility or interpret the plan unless the plan language expressly confers such authority on the administrator.").

The Second Circuit also rejected the argument that discretionary authority can be implied. *Masella v. Blue Cross & Blue Shield, Inc.*, 936 F.2d 98, 103 (2nd Cir. 1991). Blue Cross argued that discretion was implicit because it was empowered to decide the scope of services that were offered and that the major medical expense plan is "subject to the terms and conditions of a basic medical surgical program which is acceptable to the Corporation, in its sole discretion." The court recognized the importance of preserving *Firestone*:

> [e]very employee benefit plan describes the scope of its coverage and describes the benefits it provides. If, as Blue Cross argues, discretionary authority to initially establish these terms and conditions of the plan were equivalent to an implicit grant of discretion to interpret the terms once they were established, then every benefit plan would be held to implicitly grant such discretion to the entity that established it. We cannot accept the conclusion that the discretion to establish the terms of a plan is the same as the discretion to interpret the terms later. Such reasoning would eliminate the *Firestone* distinction between plans that give an administrator or fiduciary discretionary authority to interpret them and those that do not.

Id., at 103.

The court further stated that a fiduciary has the ability to protect itself by including a provision granting it discretion. "[R]equiring that this discretion be provided for is consistent with ERISA's purposes of 'promot[ing] the interests of employees and their beneficiaries in employee benefit plans' and 'protec[ting] contractually defined benefits.'" *Id.*, at 103 (citing *Firestone*, 489 U.S. at 113).

The First Circuit has also adopted a rule in conflict with those circuits holding that discretion can be implied. *Allen v. Adage, Inc.*, 967 F.2d 695, 697 (1st Cir. 1992), holds "[e]xcept in those cases where a different level of scrutiny is indicated in the benefit plan itself, the district court considers a denial-of-benefits challenge afresh, without deferring to the employer's interpretation of the plan." Similar to the *Firestone* case, de novo review was required in *Allen* because nothing in the plan indicated otherwise and the phrase "reduction in force" was ambiguous. See, also, *Bellino v. Schlumberger Technologies, Inc.*, 944 F.2d 26, 29 (1st Cir. 1991) (because defendant "points to no language giving it 'discretionary authority,' " the court applied a de novo standard.)

Contrary to these cases requiring an express grant, the Third Circuit holds that discretionary powers may be implied by a plan's terms—even if not granted expressly. *Luby v. Teamsters Health, Welfare, and Pension Trust Funds*, 944 F.2d 1176, 1182 (3rd Cir. 1991). *Luby* involved a deceased employee's benefits file that contained two conflicting beneficiary designations. After stating the rule that "[d]iscretionary powers may be implied by a plan's terms even if not granted expressly," the court held that the specific plan at issue did not impliedly grant the administrator authority to make beneficiary determinations and his decision was thus subject to de novo review.

The District of Columbia Circuit rejected the argument that de novo review applied unless the word "discretion" appeared in the plan documents. *Block v. Pitney Bowes Inc.*, 952 F.2d 1450 (D.C. Cir. 1992.) The Pitney Bowes plan vested power to "interpret and construe the Plan, [and] to determine all questions of eligibility and the status and rights of Participants" as well as a provision that decisions will be "final and conclusive and binding . . ." *Id.*, at 1452-1453. The court held that these words implied discretion.

The Eleventh Circuit has found a grant of discretion on language nearly as scant as that involved in *Bogue*. In *Anderson v. Blue Cross/Blue Shield*, 907 F.2d 1072 (11th Cir. 1990), the court equated "[t]he ability to exercise such discretionary power" with a *grant* of discretionary authority. *Id.*, at 1076. Blue Cross merely had the right to determine which procedures were medically necessary and what amount would be paid to physicians as "reasonable and customary." As in *Bogue*, there was no language *granting* discretion.

The conflict in the circuits can be summarized as follows. Those circuits holding that discretionary authority can be implied by generic language of the administrator's decision-making powers include the Third Circuit in *Luby*, the Ninth Circuit in *Bogue*, the Tenth Circuit in *Pratt*, the Eleventh Circuit in *Anderson* and the District of Columbia Circuit in *Block*. Those circuits holding that discretionary authority can only be found if there is clear or express language of discretion in the plan documents include the First Circuit in *Allen* and *Bellino*, the Second Circuit in *Masella*, the Fourth Circuit in *Dzinglski*, the Fifth Circuit in *Wildbur*, *Schultz* and *Cathey*, the Sixth Circuit in *Brown* and *Johnson*, the Seventh Circuit in *Ziaee* and *Petrilli*, and the Eighth Circuit in *Baxter*. The frequency with which this issue arises in the lower courts and the conflicting decisions of the circuits demonstrates the need for resolution of the issue by this Court.

C. The Rule Established by the Ninth Circuit in *Bogue*.

The Ninth Circuit in *Bogue* has gone further than any circuit by inferring discretionary language merely because the administrator had to use judgment in deciding claims. A judgmental function in analyzing claims or interpreting the plan document should not connote a grant of discretion to decide the issue under *Firestone*. Such a rule vitiates the meaning of *Firestone* because it limits de novo review to only those cases where

a mathematical or self-defining analysis of the claim is required. In those situations the plan is self-executing; the administrator's function is limited to claim computation without *any* judgmental analysis. Under the holding in *Bogue*, the possibility of de novo review becomes virtually non-existent because mathematical and self-defining analyses generate little controversy.[6]

A recent New York district court case specifically rejected the rationale of *Bogue* when *Bogue* was at the district court level.[7] On remarkably similar facts, Judge Mukasey of the Southern District of New York declined to follow the *Bogue* decision in *Clark v. Bank of New York*, 801 F.Supp. 1182 (S.D.N.Y. 1992). *Clark* involved an employee who was entitled to severance pay after a corporate acquisition *if* the employee's responsibilities were "materially diminished" within two years of a change in corporate control. This is directly comparable to Bogue's entitlement to severance pay in the event the new owners of Ampex failed to offer him "substantially equivalent employment."

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[6] A judgmental analysis was present under the facts of *Firestone*. Under the ERISA plan, Firestone provided termination pay to employees in the event of a "reduction in force." Firestone made a judgmental determination that the transfer of employees to the acquiring company did not constitute a "reduction in force" within the meaning of the plan. Yet, despite responsibility to exercise judgment, this Court held the Firestone plan did *not* confer discretionary authority and de novo review applied. The *Bogue* court also found the fact that Allied-Signal was ultimately responsible for the payment of a claim significant to a finding of discretionary authority. *Bogue*, at 1324, fn. 25. This fact was also present in *Firestone*, yet this Court held the plan did not confer discretionary authority. If responsibility for funding a plan is equated with discretionary authority, then rarely will ERISA severance claims be reviewed de novo because severance plans are typically funded by the employer.

[7] As stated earlier, the Ninth Circuit adopted verbatim the language and reasoning of the district court in *Bogue* on the issue of standard of review. *Bogue* at 1325.

The employer in *Clark* argued that the term "responsibilities materially diminished" was language indicating a grant of discretion. *Id.*, at 1189-1190. After acknowledging the phrase "materially diminished" is not self-explanatory, Judge Mukasey found its ambiguity insufficient to support a finding that the plan vested the administrator with discretion. Judge Mukasey identified the flaw in the employer's argument as follows:

> [V]irtually no standard of conduct that is not based on mathematical computation can be completely self-defining. As a result, if the mere inclusion in a benefits plan of a term such as "material" were enough to confer discretion on the plan administrator, all but the most mechanical decisions by plan administrators would be protected by the abuse-of-discretion or arbitrary-and-capricious review standard. *That would turn on its head what is supposed to be the usual rule—namely, that the de novo standard is the default standard of review and that the plan administrator appears to bear the burden of proving that "it does wield discretionary authority over benefits decisions."*

Id., at 1189, emphasis added. (Citing *Arthurs v. Metropolitan Life Ins. Co.*, 760 F.Supp. 1095, 1098 (S.D.N.Y. 1991).)

Firestone should not be read to deny de novo review to all claims requiring judgmental analysis. Judge Mukasey recognized that this would be the effect if judgmental claim analysis was equated with a grant of discretionary authority. After a complete and accurate analysis of the issues raised in *Bogue* at the district level, Judge Mukasey declined to follow *Bogue* "because the Allied-Signal plan did not explicitly grant discretionary authority to the plan administrator." *Id.*, at 1190. After concluding the crucial issue in *Bogue* was whether or not the two jobs had responsibilities "similar," Judge Mukasey stated:

> [t]he *Bogue* plan did no more than include one term —"similar"—that was not self-defining. Because I find that a plan's mere inclusion of such a term is insufficient by itself to vest the plan administrator with discretion, and thereby overcome the presumption of *de novo* review under *Firestone*, I decline to follow *Bogue*.

Id., at 1190.

D. *Bogue* Should not Stand as the Law of the Ninth Circuit.

The clear message of *Firestone* was to establish de novo review at a time when "arbitrary and capricious" was the rule in all circuits. See, e.g., *Anderson*, *supra*, 942 F.2d at 394-95. The circuits disagree over what language is necessary to avoid de novo review. This Court recognized, in *Firestone*, that ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans" and "to protect contractually defined benefits." The question presented is of great importance to the millions of employees covered by ERISA plans. For them to be denied judicial review, except on an abuse-of-discretion basis, where the administrator simply exercises a judgmental function—and with no stated grant of discretionary authority—is contrary to *Firestone* and the fundamental purposes of ERISA. H.R. Rep. No. 93-533, p. 11 (1973) U.S. Code Cong. and Admin. News 1978, p. 4649 (Congress' purpose in enacting the ERISA disclosure provisions includes ensuring that "the individual participant knows exactly where he stands with respect to the plan.")

Bogue should not stand as the law of the Ninth Circuit on this important issue. This Court should grant certiorari to settle the conflict in the circuits over what language is necessary for a grant of discretion sufficient to overcome *Firestone's* default standard—that the

ERISA plan administrator's denial of benefits will be subject to de novo review.[8]

CONCLUSION

This petition provides an opportunity for this Court to resolve several outstanding and fundamental issues that often arise in ERISA litigation. The question of ERISA preemption is of major importance and this case can provide needed clarification on where to draw the line between ERISA and non-ERISA employee benefit "plans." If the Allied-Signal Special Compensation Program is an ERISA employee benefit plan, this case can also serve to establish the criteria necessary for a grant of discretionary authority to decide claims or construe the terms of a plan. For all of the above reasons, this petition should be granted.

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[8] A conflict in the circuits has also developed concerning the standard of review to be applied when a benefits decision turns on the facts of the case, rather than interpretation of the terms in the ERISA plan. *Pierre v. Connecticut General Life Ins. Co.*, —— U..S. ——, 112 S.Ct. 453 (1991) (Justices White and Blackmun dissenting from the denial of certiorari). The Fifth and Eighth Circuits have adopted the deferential standard of review to judicial review of an administrator's factual determinations. *Pierre, supra*, 932 F.2d 1552, 1562; *Oldenburger v. Central States Southeast & Southwest Areas etc.*, 934 F.2d 171, 173 (8th Cir. 1991). The Third, Fourth and Seventh Circuits are on the side of de novo review. *Luby v. Teamsters*, 944 F.2d 1176 (3rd Cir. 1991); *Reinking v. Philadelphia American Life Ins. Co.*, 910 F.2d 1210 (4th Cir. 1990); *Petrilli v. Drechsel*, 910 F.2d 1441 (7th Cir. 1990). Although Bogue's claim turns on the factual determination of "responsibilities similar," this issue was not decided by the district court because it limited its review to the question of whether Allied-Signal abused its discretion in denying Bogue's claim.

Respectfully submitted,

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